IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.992 OF 2003
IN
SUMMARY SUIT NO.2373 OF 2003

DAI ICHI KARKARIA LIMITED .. Plaintiff
V/s
RUTVIJ CHEMICALS LTD. .. DEFENDANT

Mr.Kevic Setalwad with Mrs.G.M.Kotwal i/by Tyabji Dayabhai for the Plaintiff.

Mr.H.J.Thacker with Mr.H.V.Chande for the Defendant.

CORAM: S.C.DHARMADHIKARI, J.

DATE : 14.06.2005.

P.C.:

1. Heard Shri.Setalwad, the learned Counsel appearing for the Plaintiff and Shri.Thacker, learned Senior Counsel appearing for the Defendant.

2. The Plaintiff claims a decree in the sum of Rs.1,69,89,382/- alongwith interest as more particularly set out in the Statement of Claim (Exhibit S) with further interest at the rate of 14.1% p.a. from the date of filing of the suit until payment and/or realisation. At the outset, Shri.Setalwad makes a statement that the Plaintiff is giving up the claim for interest as made at Exhibit ‘S’ and restricts the same to the principal amount mentioned therein i.e.1,61,00,000/-, as permitted by a Full Bench Decision of this Court.

3. The claim in the suit arises out of a Memorandum of Understanding (MOU) dated 17th July, 1996. It appears that the parties to this suit were desirous of entering

into Distribution Agreement, pursuant to which the Defendant would be supplying and/or arranging to supply products more particularly described in Paragraph No.2 of the Plaint. The agreement was to work on the basis of orders placed by the Plaintiff on the Defendant from time to time. Shri.Setalwad invites my attention to the Agreement/MOU. It is pointed out that this agreement was to remain in force from 1.7.1996 for two years i.e.upto 30.6.1998. The said agreement provides for mobilisation deposit and clauses pertaining thereto are relied upon by Shri.Setalwad. Clause which is relied upon, is clause No.viii, which reads thus:-

> viii. DIK shall place by way of mobilisation deposit a sum of Rs.200.00 lacs (Rupees Two Hundred Lacs only) and that this mobilisation deposit shall be kept at all times as funds of Rutvij Chemicals Limited and further that DIK shall arrange to place the said deposit of Rs.200.00 lacs (Rupees Two Hundred Lacs only) with Rutvij Chemicals Limited by or before 20th July, 1996 and/or such date as may be mutually agreed.
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> This amount of Rs.200.00 lacs (Rupees Two Hundred Lacs only) being the mobilisation deposit shall be increased having regard to the overall quantum of business between Rutvij Chemicals Limited and DIK and such review shall be made at the first instance on six monthly basis and thereafter on quarterly basis during the tenure of the arrangement.
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> This arrangement shall be in force with immediate effect, as the first instalment of Rs.30.00 lacs (Rupees Thirty Lacs only) out of the aforementioned mobilisation deposit of Rs.200.00 lacs (Rupees Two Hundred Lacs only) is given to Rutvij Chemicals Limited by DIK.
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> However, by or before 45th (Forty Fifth) day of DIK giving the aggregate mobilisation Deposit of Rs.200.00 Lacs (Rupees Two Hundred Lacs only), the effective Turnover and operations must commence - and - the committed Turnover as outlined in 4.00 (i) on an annualised basis will have to be ensured.

4. Shri.Setalwad also invites my attention to clauses

(x) and (xi). Clause (x) provides for termination of the said agreement and consequences flowing therefrom. Clause (xii) pertains to repayment of mobilisation deposit by Defendant to the Plaintiff. This clause is relied upon by both sides and therefore is reproduced for ready reference.

> xii. The mobilisation deposit shall be repaid by Rutvij Chemicals Limited to DIK in any of the following manner :
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> a. By way of "Account Payee" cheque for an amount equivalent to the mobilisation deposit.
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> b. By way of adjustments against supplies made by Rutvij Chemicals Limited to DIK during the last quarter of the tenure of the arrangement. In case the quantum of supplies are such as to being inadequate in covering the entire amount of mobilisation deposit, the balance may be paid by way of an "Account Payee" Cheque.

5. It is contended by Shri.Setalwad that there is an admission of the liability of repayment of this deposit and in that behalf reliance is placed by him on a letter dated 4th July, 1997 addressed by the Defendant to the Plaintiff, which is annexed at Exhibit ‘C’ page 27 to the Plaint. Reliance is also placed on a further letter dated 19th March, 1998 addressed by the Defendant to the Plaintiff wherein it is stated "I would also like to assure you that resolving the problem between DIK and RCL is very much on the mind of Ajay and myeslf and we shall try our level best to see that the mobilisation advance is returned at the earliest". Shri.Setalwad then places reliance upon letters addressed by the Defendant to the Plaintiff being Exhibits ‘F’, ‘G’ & ‘H’ to the Plaint, which constitute a balance confirmation and admission of liability. He then contends that there

is change in the management in the Defendant Company, but this development has no bearing in so far as the confirmation and admission of liability. Shri.Setalwad contends that the contract has been terminated by letter at Exhibit 'M' dated 25th February, 2003 and therefore a decree only for the principal sum be passed in favour of the Plaintiff and against the Defendant.

6. In support of his submissions and particularly to strengthen the submission of manitainability of the suit, Shri.Setalwad placed heavy reliance on the judgment of the learned Single Judge of this Court (Vazifdar J.) reported in **AIR 2003 Bombay 168.** Reliance is also placed by him on a judgment of another Single Judge reported in **AIR 2001 Bombay 116.**

7. Mr.Thacker, the learned Senior Counsel appearing for the Defendant, on the other hand, sumbits that the entire claim in the suit is based upon an agreement, which, in so far as it talks of mobilisation advances, is wholly sham, bogus and vitiated by fraud perpetrated by common Directors of the Plaintiff and the Defendant. He invites my attention to the agreement and contends that the underlying transation, although described as supply of some formulations and drugs, in fact, there has been no supply at all. A peculiar agreement where the supplier seeks advances to undrtake obligations of supply of material and goods is a peculiar arrangement according to Mr.Thacker. He submits that the entire agreement is camouflage for drawing monies and seeking financial assistance. This is nothing but seeking

monies for meeting a financial crisis, and since the Directors on the Board of both the Companies are common, an agreement of supply of certain articles was drawn up. In other words, that was not to be acted upon but under the garb of the same, certain monies were handed over. He submits that from the date of the agreement for seven long years, till the date of filing of the suit, there has been no supply. He invites my attention to the correspondence and more particularly the role played by Mrs.Prerna Thakore who is on the Board of both the Companies. He submits that now the monies have been siphoned away. For all these reasons, he submits that the claim in the suit being not bonafide, unconditional leave be granted to the Defendant to defend the suit. In support of his submissions, Shri.Thacker placed reliance upon a judgment of the Hon'ble Supreme Court reported in **AIR 1998 SC 2317**.

8. With the assistance of Shri.Setalwad and Shri.Thacker I have perused the plaint and the annexures thereto as well as the affidavits in reply to the Summons for Judgment. It is pertinent to note that the pleas as raised by Shri.Thacker have not been raised either upon execution of the agreement/MOU or till the date the last acknowledgement/balance confirmation letter was executed i.e.August, 2001. In fact, even in July, 2002 the stand taken by the Defendant was that M/s.Jayant Vitamins Limited, one of the group Companies, became sick and it was sought to be revived and its revival was pending. The stand of the Defendant was, as soon as this Company is revived, the financial problems

faced by the Defendant Company would be looked into and steps taken for its revival. The revival was to be a joint action on the part of the Defendant and another person Mr.O.P.Mall, an industrialist from Calcutta. In fact, the Defendant Company referred to this MOU while acknowledging its liability to the Plaintiff once again in January, 2003. Even at that stage, there was no reference to any fraud, leave alone, siphoning of funds. In the correspondence there is no reference to the agreement being vitiated in any manner, much less being sham and bogus. On the other hand it appears to me a case where a limited Company executed a MOU and admitted its liability to a distinct and separate entity viz. the Plaintiff. It may be that some of the Directors may be common, but at no stage it was contended that the MOU was nothing but an arrangement whereby some financial benefits would be extended by the Plaintiff to the Defendant.

9. One more aspect of the correspondence is that one of the product which was to be supplied under the agreement, was, according to the Defendant, manufactured from the Plant situated in the premises of M/s.Jayant Vitamins Limited and that the said premises being in possession of the Court Receiver, supplies could not be commenced and consequently the obligations under the MOU could not be discharged. In the light of this position, the liability to repay the amount advanced as mobilisation deposit came to be admitted and an assurance was given that the amount would be returned. It is only when the Advocate’s notice terminating the

agreement was received by the Defendant, through their Advocate a reply was addressed by the Defendant wherein it was contended for the first time that amount was not for mobilisation of sales but for diversion and adjustments. For the first time, it was contended that common Directors knew the status of both the entities and they were also associated with one Adhishri Trading Private Limited, in which, large amount has been diverted. It was also alleged that the Plaintiff Company had no experience of sale of the products in question.

10. In this behalf, Shri.Setalwad rightly placed reliance upon the Annual Report of the Defendant Company. To the said Annual Report and Auditors Report what is annexed is the Balance Sheet as on 31st March, 2002. In the column under Schedule 3 entitled as Unsecured Loans/Advances, business advance of the Plaintiff is clearly mentioned. Shri.Thacker relied upon the correspondence and more particularly on the annexures forming part of the letter dated 29th May, 2003 addressed by Mrs Prerna Thakore to the Company Secretary of the Plaintiff. Shri.Thacker read out various parts of this letter to urge that all three Companies viz.M/s.Jayant Vitamins Limited, the Defendant and Adhishri Trading Private Limited were working with the blessings of one Sant Asaram Bapu and the person who was associated subsequently (Mr.O.P.Mall). These persons had tremendous influence on the Directors of the Plaintiff and Defendant as well as M/s.Jayant Vitamins Limited and it is with their blessings that the funds

were diverted from one Company to another. As a part of this diversion and siphoning, MOU of the present nature was executed. Therefore, according to Mr.Thacker, the claim of the Plaintiff cannot be said to be bonafide but bogus and vitiated. In my view, apart from this correspondence/letter nothing has been pointed out which would indicate that the Defendant had either repudiated the MOU or initiated other steps to dispute the claim of the Plaintiff. The version as set out on affidavit in reply to the present Summons for Judgment, was not part of the correspondence that the Defendant Company had with the Plaintiff. It may be that the Plaintiff and Defendant are part of one group and having common Directors that some arrangement may have been arrived at, but neither is that pleaded or placed on record earlier, nor is it wholly substantiated with the assistance of the letter of the Defendant Company. The role played by Mrs.Prerna Thakore, Mr.Mall, Mr.Asaram Bapu is something which would not permit the Defendant Company to wriggle out of an admission of its liability straightway. Ultimately, these are limited Companies who have existence independently from that of their Directors. Therefore, it will not be proper to accept the case of the Defendant straightway and hold that the MOU is either bogus or camouflage and was not meant to be acted upon.

11. The Defendant does not dispute that a Summary Suit could be maintained on the basis of balance confirmation and admission of liability. It does not dispute the execution of the MOU, however, it disputes the

underlying transaction, as being one not intended to be acted upon.

12. The prniciples on which an application for leave to defend a summary suit is to be considered are by now well-settled. No reference is needed to the judgments of the Supreme Court or this Court in that behalf. The mandate flows from the order 37 Rule 3 and more particularly sub-rule 5 thereof. The first proviso to sub-rule 5 contemplates recording of satisfaction by the Court that the facts disclosed by the Defendant not indicating a substantial defence. However, the said proviso, contemplates that the defence intended to be put up by the Defendant ought not be frivolous or vexatious.

13. In my view, out of the several defences raised on behalf fo the Defendants, those pressed before me pertaining to conspiracy and collusion would require the Defendant proving the allegations more particularly mentioned in paragraph No.6 of the affidavit. Such allegations are not flowing from the correspondence prior to the termination of the MOU. At the most it could be said that they are continuation of the letter addressed by the Defendant’s Advocate disputing the claim of the Plaintiff. The Hon’ble Supreme Court has laid down tests and one of the test is showing mercy to a Defendant even if the defence raised is practically moonshine, illusory or sham. The Supreme Court decision relied upon by Shri.Thacker does not say that in all cases, where fraud is alleged, unconditional leave must

be granted. Some material has to be produced. In the present case, only on the basis of the Defendant Advocate's letter it cannot be said that the transaction is vitiated. In the present case, the Defendant having raised an issue of the agreement being result of conspiracy and collusion between the common Directors of group Companies, interest of justice would be served if an opportunity is given to substantiate the same on a condition of deposit of substantial sum in this Court. Accordingly, the following order:-

A. Leave to defend the suit is granted to the Defendant on the condition that Defendant deposits in this Court a sum of Rs.1,00,00,000/- (Rupees one crore) within a period of 16 weeks from today.

B. On the said sum being deposited, the suit shall stand transferred to the list of commercial causes with usual directions of filing written statement, discovery and inspection.

C. If the amount is not deposited within the time stipulated, further consequences in law would follow.

D. If the amount is deposited as directed, liberty is reserved for the Plaintiff to apply for withdrawal of the same and that request would be considered on its own merits.

14. Summons for Judgment is disposed of in the above

terms, with no order as to costs.

(S.C.DHARMADHIKARI J.)